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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 46.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF OF PETITIONER ON MERITS.

I.

OPINION OF THE COURT BELOW.

On December 13, 1955, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Southern District of Ohio, and rendered final judgment for the respondent (R., 44, 45). The opinion of the Circuit Court is reported in 228 F. (2), 902. The District Court directed the jury to return a verdict for the respondent on the motion of the respondent at the close of petitioner's evidence (R., 40-43) and rendered judgment on that verdict (R., 43).

II.

JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit under review was dated and filed December 13, 1955 (R., 44, 45).

This court granted certiorari on April 23, 1956 (R., 45).

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred upon this court by the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254 (1), which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * * * * * * * * * *"

QUESTION PRESENTED FOR REVIEW.

In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that petitioner was a freight conductor in the employ of respondent riding in the caboose of respondent's freight train and that while the train was under the exclusive control of the respondent, moving within the respondent's yard limits, it was brought to a sudden and unexpected stop without warning or notice of any kind to petitioner and at a place where the train did not ordinarily stop and petitioner was thrown against a table and onto the floor sustaining severe personal injuries, was the District Court in error in refusing to submit the case to the jury on a permissible inference of respondent's negligence under res ipsa loquitur?

STATUTES INVOLVED.

The question presented for review in this case involves two statutes passed by Congress. The pertinent statutes in the Federal Employers' Liability Act involved in this appeal are Sections 51 and 54 of Title 45, U. S. C.

Section 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Section 54 provides:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the United States District Court for the Southern District of Ohio. Petitioner was an employee of respondent. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employer' Liability Act (Title 45, U. S. C., Sections 51 and following) were, therefore, invoked.

At the trial only two witnesses were presented: the plaintiff and his physician. The uncontroverted evidence was that the petitioner was a man past 50 years of age, presently residing near Leon, West Virginia. He hired out to the respondent railroad in 1929, and remained with it until he was injured in 1951 (R., 6). On February 1, 1951, the date of his injuries, petitioner was performing his regular duties as a freight conductor on the Richmond, Indiana to Columbus, Ohio run. He and the flagman rode in the caboose at the rear of the train which consisted of a steam locomotive, a diesel engine, 60 some freight cars and the caboose (R., 11). The train, as far as operation

was concerned, was within the exclusive control of the respondent's engineers (R., 38). Petitioner did not exercise any control over what happened in the locomotive or engine at the head of the train.

While passing through the respondent's yard limits in the city of Dayton, Ohio, the movement of the train came to a sudden stop about two miles before the place where it was scheduled to stop, and petitioner was thrown violently against a table and then to the floor with the flagman landing on top of him. The petitioner described, as best he could what happened:

> "Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was upon the floor with my flagman on top of me, when we finally got straightened up." (R., 12.)

The petitioner told how, after he got up, he made an investigation and concluded that someone (probably the engineer) in the engine had made a sudden application of the air brakes (R., 16). Petitioner testified that there was more than one way to apply the brake and stop the train. Near the end of his testimony the following questions and answers appear (R., 26):

> "Q. In addition to putting the train in an emergency braking situation, is there any other way you can slow down the speed of a train or stop it? A. Yes, you can make a service application.
>
> Q. Will you explain what a service application of the brake is? A. Well, that is when the engineer would draw it off gently and let it come to a gradual, easy stop."

Petitioner further testified that when the train went into this sudden stop he had no warning and there was nothing he could do to protect himself. He testified that the train

was not scheduled to stop in the vicinity of where this event took place, although they were within the Dayton yard limits (R., 19). During the 22 years plaintiff had been with the railroad, he had been riding only 3 or 4 or 5 times when the train was brought to such a sudden stop and that occurred when a train line would break or air hose bust. Never had it been as disastrous as this time.

Petitioner and his attending physician testified to the nature and extent of the injuries which resulted. Since that is not involved in this appeal we will not go into detail except to observe that plaintiff did receive permanent and disabling injuries, and he has been unable to work since the date of this occurrence.

On cross examination the petitioner testified that subsequent to his injuries the engineer admitted that he had made a sudden application of the brakes, and petitioner so reported the occurrence to the train master in Columbus. Based on this conversation with the engineer, petitioner, at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent. The contents of that report are as follows (R., 32):

> "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip."

The petitioner further testified that from his position in the caboose he could see nothing and that he had no personal knowledge of why the train was suddenly stopped.

On motion of the respondent the trial judge directed the jury to return a verdict for the respondent and the court entered judgment thereon on January 25, 1954. Petitioner's motion for new trial was filed on February 2, 1954 and overruled eleven months later on December 17, 1954.

On appeal the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court stating that:

> "There was a complete absence of probative facts to support the conclusion of negligence. Lavender v. Kurn, 327 U. S., 645 (1946). And negligence remains the sole basis of liability under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S., 54 (1943)."

SUMMARY OF ARGUMENT.

This is an action arising under the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following), but the issues transcend that Act.

The basis for the opinion of the Court of Appeals is not clear. Three interpretations of this opinion are possible:

(1) If the court is saying that the doctrine of res ipsa loquitur is ont applicable to actions brought under and by virtue of the Federal Employers' Liability Act, the ruling abolishes rights granted employees and the ruling is contrary to numerous decisions of the United States Supreme Court and other United States Courts of Appeals.

(2) If the court is saying that there was not sufficient evidence to permit the application of the doctrine of res ipsa loquitur and submit the case to the jury then the Circuit Court has placed an almost impossible burden of producing evidence upon the plaintiff and has reversed a former decision of the same court and established a direct conflict of authority between Circuit Courts and between this Circuit Court and several state courts.

(3) If the court is saying that the inference of negligence authorizing application of the doctrine of res ipsa loquitur has been rebutted as a matter of law, the court has substituted itself for the jury to determine whether an inference of fact had been rebutted contrary to principles announced by the Supreme Court of the United States.

The practical effect of the holding of the Circuit Court, if permitted to stand, will seriously erode, if not completely wipe out, the principle of res ipsa loquitur in the Sixth Circuit. It ignores the fact that railroads owe a *continuing duty* to provide a reasonably safe place for its employees to work. This error on res ipsa loquitur reaches beyond actions by railroaders. It involves a misconception of the respective functions of judge and jury.

ARGUMENT.

There can be no doubt that the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 et seq.) creates a positive legal duty for a railroad engaged in interstate commerce to provide a reasonably safe place for its employees, such as petitioner, to work. Respondent was under a legal duty to exercise due care for the safety of its employees; this was a continuing duty. *Bailey v. Central Vermont Railway, Inc.*, 319 U. S., 350 (1943); *United States Railroad Administration v. Monahan*, 79 2nd App., 309, 137 N. E., 778 (1923).

Petitioner's place to work, during the movement of the train, was in the caboose and the defendant railroad required that he prepare the bills of lading for the various freight shipments as the train moved from city to city.

Petitioner was injured from an obvious violation of the legal duty owed to him by respondent, to-wit: his place to work was made unsafe by the conduct of the respondent.

Res ipsa Loquitur is an appropriate and adequate vehicle to carry the petitioner's case to the jury.

This court has defined res ipsa loquitur and set forth the elements necessary for its application in *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89 (1912). At pages 98 and 99 the court held:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In *Nashville, C. & St. L. Ry. Co. v. York,* 127 F. (2), 606 (6 CCA, 1942), it was stated:

> "The highest court has made it clear that while the res ipsa loquitur doctrine does not compel an inference of negligence from the facts of an occurrence, it does warrant such inference; that the facts of an occurrence furnish circumstantial evidence of negligence where direct evidence of the same may be lacking; that the evidence must be weighed, but not necessarily accepted as sufficient; that explanation or rebuttal is called for, though not necessarily required; that a case for the jury is made, though the jury's verdict is not forestalled; that the defendant's general issue is not converted into an affirmative defense; and that 'when all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.' Sweeney v. Erving, 228 U. S., 233, 240, 33 S. Ct. 416, 418, 576 Ed. 815."

Contrary to allegations put forth by the respondent (see page 8 of respondent's brief on petition for certiorari), the accident need not be explicable only in terms of negligence to invoke res ipsa loquitur, *Johnson v. United States,* 33 U. S., 46, 49 (1948).

This court has held that the doctrine of res ipsa loquitur is applicable to actions arising under the Federal Employers' Liability Act. *Jesionowski v. Boston & Maine Railroad,* 329 U. S., 452 (1947); *O'Neill v. The Baltimore & Ohio Railroad Company,* 348 U. S., 956 (1954), reversing 211 F. (2), 190.

The petitioner has not assumed the risk of negligence by the respondent in suddenly stopping a train. Title 45, Sec. 54, U. S. C.; *Devine v. Chicago R. I. & P. Ry. Co.,* 226 Ill., 248, 107 N. E., 595 (1914), affd. 239 U. S., 52 (1915).

It is manifest that the respondent had exclusive control over the "thing which causes injury", the train. Such control was exercised by the engineer and other employees of respondent in the engine. The petitioner, riding in the

caboose had no control over the train, and his injuries were completely without his fault. It is equally obvious that petitioner had no control over the respondent's yard limits where this occurred.

The sudden stopping and the resultant injuries to the petitioner were not "such as in the ordinary course of things" occur when the one having control of the train uses proper care. It is common knowledge that a train can and should be stopped without causing a person riding in the caboose to be violently thrown against a table, damaging the table, and then onto the floor with another person landing on top of him. The petitioner testified that a "service application" of the brakes could have been made bringing the train to a smooth stop. Anyone who has ever ridden in a train knows this and can envision the danger of a sudden, unexpected stop to passengers and employees on board. If occurrences such as this were the common thing to be anticipated, surely we would all seek safer means of transportation.

Certainly, in the words of the Supreme Court in *San Juan Light Company v. Requena*, 224 U. S., 89, 99:

> "* * * the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, (and) it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

Similar situations have been before the Federal Courts before, and on similar evidence the courts have held that res ipsa loquitur was applicable and the burden of going forward with the evidence was upon the defendant. The case of *Zumwalt v. Gardner*, 160 F. (2), 298 (8 CCA, 1947) is directly in point.

The plaintiff alleged that he was a switchman, employed by the defendant. While attempting to board a switch engine, "it suddenly, unexpectedly, and with an unusual and

violent jerk, threw and knocked him from the footboard of the engine," causing him to fall and be run over by the engine. He alleged that the action of the engine was caused by (1) the engineer negligently applying the emergency brakes or (2) defects in the braking system causing the brakes to be set in emergeney without fault of the engineer. At trial the engineer, called by the plaintiff, denied applying the emergency brake. *There was no evidence to contradict him.* The trial court withdrew the first alleged ground of negligence from the jury but submitted the second. On appeal, the Circuit Court of Appeals held that the trial court erred in withdrawing the first alleged ground of negligence from the jury. At page 302, the appellate court held:

> "* * * The sudden stopping of the engine resulting in jarring plaintiff from the footboard was, we think, circumstantial evidence of negligence because the engine was under the exclusive control and management of the defendant and the accident in the ordinary course of events would not have occurred if proper care had been observed."

In *Chesapeake & Ohio Ry. Co. v. Smith,* 42 F. (2), 111 (6 CCA, 1930), the plaintiff, employee, was riding in the caboose when the train of 98 cars stopped so suddenly he was thrown through the open vestibule. After the accident a break in the train line was found only twenty cars from the caboose. The plaintiff, himself an experienced brakeman, testified that a break in the train line only twenty cars from the caboose would make a "reasonable stop on the rear end," and that "an emergency application" of the brakes by the engineer was the only thing that could have caused the severe jolt. At page 114 this court held:

> "* * * On this assumption that the break was caused by the sudden application of the brakes by the engineer, plaintiff's evidence, in our judgment, sufficed to make applicable the rule of res ipsa loquitur as developed in the cited cases * * *"

In the very recent case of *The Kansas City Southern Railway Company v. Justis*, 232 F. (2d), 267 (1956), the Fifth Circuit Court of Appeals had before it these facts:

> "This action under the Federal Employers' Liability Act was brought by the appellee, a freight train conductor, as plaintiff, against the appellant railroad, as defendant. Plaintiff and brakeman Young were in the caboose at the rear of the train when it was brought to a stop for a scheduled inspection at Shoreline, Louisiana. According to their testimony, the train stopped with an unusual jerk or jolt, so extraordinary that the left side of plaintiff's neck hit against an iron safety pole a few inches away and he then hit the floor, and Young was propelled down the aisle in a run for 15 to 18 feet, and then he gripped a seat which broke the force of his forward movement."

On page 269 the court held:

> "There was ample evidence, as heretofore indicated, from which the jury could have found that the train stopped with such a sudden, extraordinary and violent jerk or jolt as ordinarily does not occur in the absence of someone's negligence."

The Circuit Court affirmed the District Court in submitting the case to the jury on the doctrine of res ipsa loquitur.

The court cited *Raze v. St. Louis Southwestern Ry. Co.*, 360 Mo., 222, 227 S. W. (2), 687, included at page 16 of our brief. It would appear from the facts in the *Justis* case that the instant case is even stronger in that Justis knew the train was about to stop. In the instant case, respondent had no warning of the sudden, violent stop which resulted in his injuries.

Several state court decisions are also worthy of attention. In *Missouri Pac. R. Co. v. Montgomery*, 186 Ark., 537, 55 S. W. (2), 68 (1933), cert. den. 289 U. S., 747 (1933), the plaintiff was a brakeman riding in the caboose. The

train suddenly and unexpectedly stopped, and plaintiff was thrown against a desk, sustaining severe injuries. The plaintiff testified that he believed the sudden stop was due to improper application of the air by the engineer. The engineer denied that he applied the brakes. The Supreme Court of Arkansas held that res ipsa loquitur was applicable and a jury issue was presented. The court observed:

> "It would of course have been impossible for the appellee (plaintiff) to have known of the existence of the negligence of the engineer because he was in the caboose sitting and could not have seen any evidence of the negligence before his injury."

Other state court decisions in which the doctrine of res ipsa loquitur has been applied to enable an injured railroader to recover damages due to the negligence of the railroad in suddenly stopping its train include:

Castonia v. Maine Cent. R., 78 N. H., 348, 100 A., 601 (1917);

Lamb v. Atlantic Coast Line R. Co., 179 N. C., 619, 103 S. E., 440 (1920);

Ft. Worth & D. C. Ry. Co. v. Stalcup (Tex.), 167 S. W., 279 (1914).

Among the passenger cases which are worthy of attention is *Southern Pac. Co. v. Hanlon*, 9 F. (2), 294 (9 CCA, 1925). The plaintiff was thrown to the floor by reason of the sudden stopping of the train, brought about by an emergency application of the brakes. The answer denied any negligence in so stopping and averred that the train was stopped to save the life of a trespasser who had missed his footing in attempting to board the train. The Court of Appeals held that this was clearly a res ipsa loquitur situation and that a jury question was presented as to whether the defendant had justified its act.

See also *McQuin v. Santa Fe Trail Transp. Co. et al.*, 155 Kans., 111, 122 P. (2), 787 (1942) and *Delaware Coach Co. v. Reynolds*, 45 Del., 226, 71 A. (2), 69 (1950).

Analogous to the instant case is the situation in which a train is derailed and the railroad claims it was due to the fault of a third person.

In *Fink v. New York Cent. R. Co.*, 144 Ohio St., 1, 56 N. E. (2), 456 (1944), the Supreme Court of Ohio held that res ipsa loquitur was applicable where the plaintiff, a United States Government mail clerk, proved that the mail car in which he was riding was derailed and that he was injured as a result. Defendant offered evidence that an automobile without lights, had been overturned on the tracks prior to the collision through no fault of the defendant and that the collision and consequent derailment could not have been avoided by defendant's employees. The trial court's refusal to charge on res ipsa loquitur and a verdict and judgment for defendant were reversed and remanded by the Supreme Court. On page 5 of its exhaustive opinion the court observed:

> "The particular justice of the doctrine rests upon the foundation that the true cause of the occurrence whether innocent or culpable is within the knowledge or access of the defendant and not within the knowledge or access of the plaintiff."

Under the Federal Employers' Liability Act, it frequently has been applied where railroad employees have been injured when the train on which they were riding was derailed. *Jesionowski v. Boston & Maine R. R. Co.*, 329 U. S., 452 (1947); *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55 (8 CCA, 1947); *Nashville, C. & St. L. Ry. Co. v. York*, 127 F. (2), 606 (6 CCA, 1942); *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. (2), 271 (8 CCA, 1941), cert. den. 314 U. S., 680 (1941); *Lowery v. Hocking Valley Ry. Co.*, 60 F. (2), 78 (6 CCA, 1932).

Res ipsa loquitur has also been applied where a railroader was injured due to the sudden starting of a train. *Moore v. Grand Trunk Ry. Co.*, 93 Vt., 383 (1919), 108 A., 334; *Raze v. St. Louis, S. W. R. Co.*, 360 Mo., 222, 227 S. W. (2), 687 (1950).

The essential elements of res ipsa loquitur have been shown: the respondent owed to the petitioner a duty to exercise care in accordance with the dangers of the situation; the respondent had exclusive and complete control over its tracks and yard limits; the petitioner was entirely without fault; and the injuries were not such as in the ordinary course of things occurs if the respondent had used proper care. A jury issue was presented. The courts have so held in cases almost identical in their essential facts with this case as well as in analogous cases.

If the instant case is allowed to stand unaltered the ruling of this court in *O'Neill v. The Baltimore & Ohio Railroad Company*, 348 U. S., 956 (1954), reversing 211 F. (2), 190, will be effectively reversed, for the *O'Neill* case held that the Sixth Circuit Court of Appeals cannot substitute itself for the jury in determining issues of fact—in that case, as in this— whether the inference of negligence has been rebutted.

The United States Supreme Court has jealously guarded the worker's right to have his case submitted to the jury. *Wilkerson v. McCarthy*, 336 U. S., 53 (1949). And it cannot be contended that a jury finding for the plaintiff in this action would be mere speculation or conjecture, and the trial court's action defended on that ground.

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of

those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Lavender v. Kurn, 327 U. S., 645, 653 (1946).

The Court of Appeals for the Eighth Circuit recently expressed the law which should have been applied in this case:

"Only where the defendant's evidence of explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case. * * * And these in cases under the Federal Employers' Liability Act will be situations of the 'rarest exceptions'. * * *"

Chicago & N. W. Ry. Co. v. Green, 164 F. (2), 55, 60 (8 CCA, 1947)."

CONCLUSION.

The Court of Appeals for the Sixth Circuit has committed serious error in its decision on res ipsa loquitur.

The judgment in the instant case was based upon an erroneous concept of the law as regards res ipsa loquitur. If this misconception is allowed to stand unaltered it will result in serious erosion of the doctrine in the Sixth Circuit.

The judgments of the District Court and Circuit Court of Appeals should be reversed and petitioner should be granted a new trial.

Respectfully submitted,

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